

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

ORIGINAL **77-4118**

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

THE LONG ISLAND RAIL ROAD COMPANY,
Petitioner,
v.

THE UNITED STATES OF AMERICA, and THE INTERSTATE
COMMERCE COMMISSION,
Respondents,

S & K FARMS, INC., and FREIGHT USERS ASSOCIATION OF
LONG ISLAND, INC.,
Intervening Petitioners,

SOUTHERN PACIFIC TRANSPORTATION COMPANY, THE ATCHISON,
TOPEKA AND SANTA FE RAILWAY COMPANY, MISSOURI
PACIFIC RAILROAD COMPANY, ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY, and UNION PACIFIC RAILROAD COMPANY,
Intervening Respondents.

PETITION FOR JUDICIAL REVIEW OF AN ORDER OF
THE INTERSTATE COMMERCE COMMISSION

BRIEF OF PETITIONER

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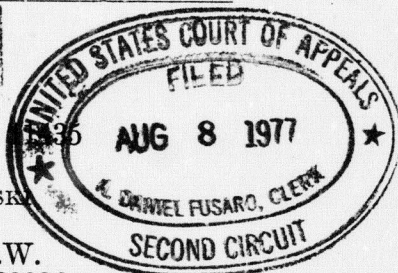


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Preliminary Statement

On June 7, 1977, The Long Island Rail Road Company (hereinafter "LIRR"), petitioned this Court for review of an Order of the Interstate Commerce Commission (hereinafter "ICC") dated April 13, 1977, issued in a proceed-

ing docketed and entitled No. 36432, *Fresh Fruits and Vegetables From the Southwest*, a copy of which Order was annexed to the Petition for Review and a copy of which Order is set forth in the joint appendix.¹

Effective September 15, 1976, the Southwestern railroads, in conjunction with their connections in the east and the south other than LIRR, filed a comprehensive revision of rates on fresh fruits and vegetables originating in Southwestern territory. By Order served September 17, 1976, Division 2 of the ICC instituted an investigation into the lawfulness and reasonableness of the tariff schedules² and by order served November 8, 1976, the ICC granted LIRR's petition for leave to intervene in the proceeding.³

After public hearings, the Administrative Law Judge, on February 24, 1977, served his Initial Decision,⁴ a copy of which was also annexed to the Petition for Review. The Initial Decision, *inter alia*, found that the failure of the other railroads to extend a level of rates to points on the LIRR which, when coupled with LIRR's terminal surcharge, would equal the rates extended to the rest of the New York, N. Y. rate group, resulted in violations of Section 1(6) and 3(1) of the Interstate Commerce Act. (LIRR's terminal surcharge of 12.5 percent had been made effective as a result of Public Law 93-69, which required the railroads to pay increased railroad retirement taxes, but allowed them to "pass through" the increased expense to shippers through increased freight rates.)

Following the filing of Exceptions to the Initial Decision by the Southwestern railroads⁵ and Replies thereto by LIRR⁶ and other parties, Division 2 of the ICC, by Deci-

¹Joint Appendix p. 107a. Hereinafter reference to pages in the Joint Appendix will be indicated as J.A. p.

²J.A. p 10a.

³J.A. p 19a.

⁴J.A. p 20a.

⁵J.A. p 55a.

⁶J.A. p 89a.

sion and Order dated April 13, 1977, and served April 20, 1977,⁷ in effect reversed and vacated the findings of fact and law of the Administrative Law Judge.

The decision and Order of the ICC, as to which review is sought, violates the Interstate Commerce Act, 49 U.S.C. § 1 *et seq.* and the Administrative Procedure Act, 5 U.S.C. § 557 *et seq.* in that it is arbitrary and capricious, in excess of statutory authority, unsupported by substantial evidence and contrary to law.

This Court is authorized by 28 U.S.C. § 2321 *et seq.* and § 2341 *et seq.* and by the Administrative Procedure Act, 5 U.S.C. §§ 702-704 and § 706, to review and set aside Orders of the ICC and this Court has jurisdiction of this Petition for Review pursuant to 28 U.S.C. § 2321 and § 2342.

Petitioner, LIRR, maintains its principal office at Jamaica Station, Archer Avenue and Sutphin Boulevard, Jamaica, County of Queens, State of New York, a location within the Second Judicial Circuit and venue, therefore, properly lies in this Circuit pursuant to 28 U.S.C. § 2343.

The United States of America has been named as a Respondent herein pursuant to 28 U.S.C. § 2344 and the Interstate Commerce Commission, an administrative agency of the United States of America, has been named as a respondent pursuant to Rule 15, Federal Rules of Appellate Procedure. By order dated July 1, 1977, S & K Farms, Inc., and Freight Users Association of Long Island, Inc. were permitted to intervene in support of petitioner, and by order dated July 18, 1977, Southern Pacific Transportation Co., Atchison, Topeka and Santa Fe Railway Co., et al., were also permitted to intervene in support of respondents.

⁷ J.A. p 107a.

Statement of Issues Presented

1. Was it reversible error for the ICC to approve a rate structure on fruits and vegetables from the Southwest which split up the New York, New York Rate Group, while preserving the integrity of all other rate groups.
2. Did the ICC err in failing to require the cancellation of a rate structure which was not only in violation of Section 3(1) of the Act but which it, in essence, had found in another proceeding, violated Section 1(6) of the Act.
3. Did the ICC err in refusing to act with regard to a rate issue because of a completely unrelated divisions dispute.

Statement of the Case

The facts are not in dispute in this case, and the issues presented are purely questions of law.

The present action can be traced back to Public Law 93-69, which added a new Section 15a(4) to the Act in 1973. By that law, the railroads were required to incur very substantially higher railroad retirement tax expenses, but were permitted to recapture the increased tax expense through freight rate increases by "any carrier or group of carriers." Because LIRR engages in interstate freight operations, it was also required to pay the increased railroad retirement tax expenses with regard to employees engaged in intrastate passenger operations, and the total additional tax expense incurred by LIRR was relatively much greater than that by any other railroad. All the other railroads, except LIRR, acted as a group and sought a uniform increase in their freight rates to "pass through" the increased tax expense, and the ICC finally approved an increase of 2.8 percent in Ex Parte No. 299, *Increases in Freight Rates and Charges—1973*, 350 I.C.C. 673. Since LIRR's freight revenues totaled less than \$10 million in

1973 and its projected increased railroad retirement tax expense exceeded \$6 million annually, if LIRR had joined with the other railroads, it would have received about \$280,000 or less than 5 percent of its increased tax expense, with the rest going to other railroads as a "windfall." It would have been an obvious mockery of the law to require LIRR—whose freight revenues cover only a part of its freight expenses—to join in the general freight rate increase and recover only 5 percent of the added expenses resulting from the enactment of P.L. 93-69, with the other railroads getting the rest of the added revenues authorized to cover LIRR's increased expenses.

LIRR, therefore, "flagged out" of the general 2.8 percent increase in Ex Parte No. 299, and published a separate terminal surcharge⁸ applicable on all freight traffic originating or terminating at points on the LIRR, with all of the proceeds therefrom accruing solely to LIRR. The ICC originally disapproved LIRR's separate terminal surcharge as an interim measure, but its action was reversed and the tariff approved by the three-judge District Court in *Long Island R. v. United States*, 388 F. Supp. 943 (E.D.N.Y. 1974). The ICC itself then approved the 12.5-percent surcharge in Ex Parte No. 299 (Sub-No. 1), (350 I.C.C. at 705-717) at the same time it approved the 2.8-percent general increase for all the other railroads. A petition for reconsideration by the ICC of its approval of LIRR's terminal surcharge, filed by the Western and Southern lines in Ex Parte 299 (Sub-No. 1), was denied by the ICC by order dated November 23 and served December 9, 1976.⁹

⁸ The interim surcharge was 3.5 percent effective October 8, 1973, was increased to 5.5 percent effective January 1, 1974, and finally to 12.5 percent effective December 19, 1974. (350 I.C.C. at 705-706)

⁹ A petition for review of the ICC's decision and order in Ex Parte No. 299 (Sub-No. 1) was filed by the Southern and Western railroads in the United States Court of Appeals for the Fifth Circuit and is now pending in Civil No. 77-1054, *Aberdeen & Rockfish Railroad Company, et al. v. The United States of America, et al.*

LIRR has, in the past, "flagged out" or attempted to "flag out" of several general freight rate increases, and Ex Parte No. 299 did not mark the first time it had done so. In 1969, the evidence indicated that the general increases were self-defeating, so far as LIRR was concerned, with diversion of traffic offsetting the increases in rates. LIRR, therefore, tried to "flag out" of Ex Parte Nos. 262, 265, 267 and 281, but its efforts to do so were thwarted by the ICC and the other railroads, who refused to honor LIRR's "flag-outs." LIRR's right to take such independent action was finally confirmed by this Court in *Ajayem Lumber Corp. v. Penn Central Transportation Co.*, 487 F. 2d 179 (1974), and LIRR flagged out of Ex Parte No. 295 and several subsequent general increases without interference from the other railroads.

LIRR was, however, forced to concur in most of the general increases as a result of the legislation establishing the Consolidated Rail Corporation. That law apparently gave the new Conrail the option to adopt or reject existing joint rates with other carriers, and Conrail notified LIRR it would not adopt the then-existing joint rates to or from points on LIRR. In a compromise agreement¹⁰ with Conrail and the other carriers made effective in March of 1976, LIRR agreed to validate the unlawfully imposed increases in Ex Parte Nos. 262 through 281 and to join in the Ex Parte No. 295 and subsequent increases, except for Ex Parte No. 299 (2.8 percent) and Ex Parte No. 305 (10 percent). When LIRR's 12.5-percent surcharge is applied to the line-haul charges which, in most cases, are about 12.8-percent lower than those to other destinations in the New York City rate group, the total paid by LIRR receiv-

¹⁰ The compromise agreement also ended the litigation then pending in Ex Parte No. 309, *Investigation Into Joint Interstate and International Rates, Long Island Rail Road Company*, when Division 2, by order dated April 23, 1976, discontinued the proceeding, in which the ICC was evidently being asked to prescribe joint rates to and from points on LIRR.

ers is about the same as that paid by their competitors. The compromise agreement enabled LIRR to retain its surcharge to cover *its* increased railroad retirement tax expense, as intended by the Congress in P.L. 93-69, while at the same time preserving joint rates to or from points on the LIRR and substantially restoring the integrity of the New York City rate group for shippers and receivers.

The other railroads, and particular the Western lines, have tried every kind of pressure either to force LIRR to give up its surcharge or to share with them the revenues produced by the surcharge (but not the LIRR's increased retirement tax expense it is designed to offset). As stated in the Administrative Law Judge's Initial Decision (at pp. 20-21):¹¹

"As the present proceeding shows so clearly, some railroads are still determined to frustrate the intent of Congress in enacting P.L. 93-69. Even though they were made whole by Ex Parte No. 299 (and in some cases, received a 'windfall' at the expense of some Eastern lines), the Western lines are insisting they be allowed to share in the revenues ear-marked to cover LIRR's increased retirement tax expense. If they cannot, then they have tried to cancel joint rates to or from points on LIRR, or insist that the total charges paid by LIRR receivers be made 12.5 percent higher than those paid by other New York City receivers, with a consequent diversion of some traffic from LIRR, or else insist that rates to or from points on LIRR be kept at abnormally low levels, with a consequent loss of revenues to LIRR and themselves.

"In I. & S. 9092, *Fresh Citrus Fruit, Transcontinental Eastbound*, decided July 1, 1976, Review Board Number 4 disapproved the proposed cancellation of certain transcontinental joint commodity rates on

¹¹ J.A. pp 39a-40a.

fresh citrus fruits to destinations on the LIRR, noting at page 14 that 'respondents have made no reply to LIRR's offer to implement a higher level of rates which would equal the basis to other destinations in the territory.' A petition for reconsideration was denied by Division 2 by order dated October 6 and served October 8, 1976.

"In Docket No. 35960, *Sunk Growers, Inc., et al. v. The Akron, Canton & Youngstown Railroad Company, et al.*, the railroads voluntarily made effective incentive rates, subject to higher minimum weights, at the X-305 level, which were substantially in accord with the initial decision of Administrative Law Judge Frederick M. Dolan, Jr., served March 4, 1975, but without providing alternative rates to points on LIRR. After a conflict of interest appeared and LIRR disassociated itself from the other railroads, Division 2 by decision and order served August 4, 1976, found that with respect to destinations on the LIRR, 'the failure of defendants to establish alternative rates on the basis of the Ex Parte No. 295 general increase level violates Section 1(5) and 1(6) of the Interstate Commerce Act' and ordered the defendants and LIRR to establish and maintain rates to LIRR at that level. (Since LIRR had flagged out of Ex Parte No. 299 (2.8 percent) and Ex Parte No. 305 (10 percent), the total charges paid by the LIRR receivers, consisting of the line-haul rates plus LIRR's 12.5-percent surcharge, were substantially the same as those paid by their competitors. It was thought by LIRR that the *Sunkist* decision, now administratively final, had finally resolved the problem of assuring that LIRR would collect its X-299, Sub-No. 1 surcharge necessary to meet its increased tax expenses under P.L. 93-69, while at the same time assuring that LIRR shippers and receivers would pay reasonable and nonprejudicial transportation charges. The instant proceeding shows,

however, that some of the railroads are still trying to find some way to frustrate the intent of Congress."

The Western railroads filed a petition for reconsideration of the *Sunkist* decision, which was denied by the entire ICC by order dated March 2 and served March 10, 1977. A petition for review was filed by the Western railroads in the U.S. Court of Appeals for the Fifth Circuit and is pending in Civil Action No. 77-1946, *The Atchison, Topeka & Santa Fe Railway Co., et al. v. Interstate Commerce Commission, et al.*

As to the presently effective rates to LIRR destinations, the Initial Decision states (at page 21):¹²

"The prior rates which were replaced by the rates here under investigation were unquestionably abnormally low and noncompensatory, and the rates to LIRR points still are. The prior rates at the X-330 level were, of course, about 12.8 percent lower to LIRR points than to other points in the New York City rate group because of LIRR's flag-outs in X-299 and X-305, so that when LIRR's surcharge was applied, LIRR receivers paid about the same total charges as their competitors. At the time the proposed new rates were being considered by the General Freight Traffic Committee—Eastern Railroads, LIRR proposed an amendment to make rates to LIRR points which, when coupled with LIRR's 12.5-percent surcharge, would result in the same total charges as to other points in the New York City rate group. The amendment was voted down, and LIRR was given the choice of maintaining its present low level of rates or accepting the New York basis of rates which, when LIRR's surcharge is added, would virtually preclude any movement. Rather than join in such new rates, LIRR kept its low rates."

¹² J.A. p 40a.

"It should be clearly understood that LIRR's proposed amendment would result in more revenues for the respondent railroads, and that the rates proposed by LIRR would still be amply compensatory. For example, from McAllen, Tex., to New York, N. Y., the new rate, subject to a 40,000-pound minimum, is \$5.74 per 100 pounds, while the variable costs are \$4.726, resulting in a revenue-cost ratio of 1.27. The present rate to LIRR points is only \$2.97 per 100 pounds at the X-330 level, and the rate proposed by LIRR would be \$5.10, or almost double the presently effective rate. The \$5.10 rate would produce a revenue-cost ratio of about 1.16, which would still be compensatory, and when the \$5.10 rate is subjected to the 12.5-percent surcharge, the total charges paid by LIRR receivers would be about the same as those paid by other receivers in the New York rate group at the \$5.74 rate without the surcharge. In trying to force LIRR to give up its surcharge and to block the rate relationships prescribed in the *Sunkist* case, the respondent railroads are willing to forego almost half the revenue they would receive under LIRR's proposal."

In his Initial Decision, the Administrative Law Judge found (at page 35):¹³

"Consistent with the above conclusions, the Judge finds that the rates under investigation are just and reasonable, but that they constitute an unreasonable practice in violation of section 1(6) and have been shown to be unduly prejudicial and preferential in violation of section 3(1) of the Act to the extent that (1) the said rates and related or alternative rates to points on the LIRR, when combined with LIRR's surcharge, do not make the total transportation charges paid by LIRR receivers the same as those paid by the other receivers in the New York City rate group, . . ."

¹³ J.A. p 54a.

The schedules under investigation were ordered cancelled by the Administrative Law Judge.

After the filing of Exceptions by the other railroads, to which LIRR replied, the ICC's Division 2, by order dated April 13 and served April 20, 1977, reversed the Initial Decision of the Administrative Law Judge. Division 2 found:

*"We find, That the evidence of record fails to establish that the rates to points on the LIRR, when combined with the LIRR's surcharge [footnote omitted], result in unequal total transportation charges in violation of sections 1(6) and 3(1) of the act; that the record does not show that receivers on the LIRR are unduly prejudiced by the difference in rates and none have appeared or otherwise complained that they are so prejudiced; that in fact, as is noted by the LIRR, the rates to points on its lines are lower than rates to other New York group points because they have failed to join in the new rates; that it is also noted by the parties that a division's dispute is in progress between the LIRR and the other carriers; that the 4R Act establishes new procedures for the handling of division disputes in § 15(6)(b); and therefore, it is inappropriate at this time to make any determination on this issue;"*¹⁴

On April 25, 1977, LIRR filed a petition with the entire Commission for a finding that an issue of general transportation importance is involved,¹⁵ which was denied by order dated May 18 and served May 25, 1977.¹⁶

LIRR thereupon filed the instant Petition for Review on June 6, 1977.

¹⁴ J.A. p 109a.

¹⁵ J.A. p 111a.

¹⁶ J.A. p 125a.

Summary of Argument

The Interstate Commerce Commission committed reversible error of law by refusing to adopt that portion of the Initial Decision of the Administrative Law Judge which held that the failure of the railroads to establish a rate structure which would preserve the integrity of the New York, New York rate group, violated Sections 1(6) and 3(1) of the Interstate Commerce Act. The Interstate Commerce Commission compounded its error by refusing to rule on the rate issue because of a completely unrelated divisional dispute between LIRR and the other railroads.

The proper and lawful rate structure which would preserve the integrity of the New York, New York rate group and which would be consistent with other current ICC decisions would consist of rates to LIRR points which, when combined with LIRR's 12½ percent surcharge, authorized by P.L. 93-69, would equalize the total transportation charges paid by all receivers in the New York, New York rate group. The lawfulness of LIRR's 12½ percent surcharge, already approved by the Court and the Commission, cannot be attacked collaterally in this proceeding and since the Administrative Law Judge, in his Initial Decision, did not attempt to prescribe rates to LIRR points, but merely ordered the cancellation of unlawful rates, it was error for the ICC's Division 2 not to adopt the Initial Decision of the Administrative Law Judge in this regard.

ARGUMENT

POINT I

The rate structure approved by Division 2, which results in different transportation charges for Long Island and other New York City receivers while protecting the integrity of all other rate groups, clearly results in an unreasonable practice in violation of Section 1(6) and in undue preference and prejudice in violation of Section 3(1).

The rate structure proposed by the railroads and approved by the ICC preserves the integrity of all major rate groups, except for points on the LIRR within the New York City rate group. Under the proposal, LIRR has three completely unacceptable alternatives.

LIRR can: (1) preserve its surcharge by maintaining the present abnormally low, noncompensatory rates, which deprive it, as well as the other participating carriers, of much needed revenues and unquestionably result in undue prejudice to other non-LIRR portions of the New York City rate group and shippers located thereat; or (2) join in the new rates to the New York rate group and add to those rates its 12.5-percent surcharge thereby subjecting LIRR receivers to undue prejudice and drying up the traffic; or (3) join in the new rates and give up the surcharge which was authorized by Congress to offset increased retirement tax expense (which expense would still continue) and which has been approved by the Court and the Commission.

LIRR chose the first alternative as the least harmful of the three, while waiting for the ICC to establish the lawful rate structure, one of the primary functions for which it was created. The Southwestern railroads would, as indicated above, almost double their revenues if they had accepted LIRR's proposal for related rates which would

equalize the total transportation charges paid by all receivers in the New York City rate group. They, however, are obviously more interested in frustrating the intent of Congress when it enacted P.L. 93-69 by forcing LIRR either to give up its surcharge or to share the revenues therefrom with the other railroads.

The decision in the present case is completely inconsistent with the ICC's decision in Docket No. 35960, *Sunkist Growers, Inc. v. The Akron, Canton & Youngstown Railroad Co.*¹⁷ holding that the failure to establish alternative rates to destinations on the LIRR violated Section 1(6) of the Act and the ICC's approval of the LIRR surcharge in Ex Parte No. 299 (Sub-No. 1), 350 I.C.C. 673. There is no way to reconcile the action in the instant case with those two decisions.

Although the *Sunkist* decision made it clear that the present rate action by the Southwestern carriers would have to be condemned under Section 1(6), even if there were no Section 3(1) violation, Division 2's finding in the instant matter under review that there is no violation of Section 3(1) is clearly wrong. Since LIRR cannot and will not give up its surcharge, it could either keep the rates at their present level, which is way below that applying to other New York City points or make them 12.5 percent higher. Either course would obviously result in a classic violation of Section 3(1), preferring some parts of the New York City rate group over others and unduly preferring some receivers in the rate group and unduly prejudicing others. While no LIRR receivers appeared in the proceedings before the Commission—probably because they assumed that the *Sunkist* decision would be followed—

¹⁷ This decision has so far not been officially reported. For the convenience of the Court, a copy of the ICC's decisions of July 29, 1976, March 2, 1977, and May 31, 1977, is set forth hereinafter as Addendum A.

S & K Farms, Inc., and Freight Users Association of Long Island, Inc., have intervened in the present Court action.

Section 3(1) prohibits any undue preference or prejudice to any "locality, port, port district, . . . region," etc. The approved rates, by splitting up the long-established New York City rate group, clearly violate that provision.

The ICC gave absolutely no justification for approving a rate structure which preserved all other rate groups, but destroyed the long-existing New York City rate group. The ICC clearly has the power, and in this case obviously had the duty, to require a rate structure which would provide equal transportation charges for all receivers in the New York City rate group. See, e.g., *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573 (1949).

The ICC clearly erred in finding that the approved rates did not violate Section 3(1) and by not following the *Sunkist* decision as to the violation of Section 1(6).

POINT II

Division 2 clearly erred in concluding it should not act because of the divisions dispute between LIRR and the other carriers.

In its order, Division 2 also found:

"... that it is also noted by the parties that a division's dispute is in progress between the LIRR and the other carriers; that the 4R Act establishes new procedures for the handling of division disputes in § 15(6)(b); and therefore, it is inappropriate at this time to make any determination on this issue;"

It is far from clear what Division 2 meant by this language, particularly as to its refusal to determine "this issue."

In I.C.C. Docket No. 35153, which was started in 1969 and completed in 1973, the LIRR received an increase of about 20 percent in its divisions of the joint rates. At the present time, as was clearly stated by LIRR on the record,¹⁸ negotiations are going on between LIRR and the other railroads regarding a further adjustment of the divisions of joint rates. But LIRR's divisions are percentages or proportions of the joint rates, regardless of the level of such joint rates. No one was asking the ICC to prescribe new divisions in the present case. When the Southwestern lines tried to inject the question of divisions into this case, the Administrative Law Judge correctly observed that this was not "the right forum for a decision." (J.A. p 134a.)

As to the possibility that the LIRR surcharge might be considered as resulting in a change in divisions, the ICC has already ruled to the contrary. In Ex Parte No. 299 (Sub-No. 1), *Increases in Freight Rates and Charges—1973*, 350 I.C.C. 673 (1975), the ICC ruled (at p. 717):

"The joint rates and divisions thereof are unchanged by the surcharge tariff. The surcharge is a separate add-on to the line-haul rates, the yield from which accrues solely to the LIRR, which flagged out of the general increase of respondents. The surcharge is not incorporated in the joint rate, and is not subject to any divisional agreement between the carriers."

It must be assumed that Division 2 is aware of the decisions of the entire ICC, so that there obviously was no "issue" of divisions in this case for it to determine.

So far as LIRR and receivers on its line are concerned, the only "issue" which Division 2 had before it was the question of lawful rates to LIRR points within the New York City rate group. Division 2 should have followed the *Sunkist* decision and required the establishment of alter-

¹⁸ J.A. pp 133a-135a.

native or related rates to LIRR points which would have produced equal total transportation charges for all receivers in the New York City rate group or, as the Administrative Law Judge did in his Initial Decision in the present case, it should have disapproved the unlawful rate structure and ordered it cancelled, which would have been, of course, without prejudice to the filing of a lawful rate structure including proper rates to points on LIRR.

Neither the ICC's 1973 decision awarding LIRR increased divisions of joint rates nor the present negotiations regarding a further and future adjustment in any way justified approval by Division 2 of a rate structure which clearly violated Sections 1(6) and 3(1).

Conclusion

For the reasons set forth above, the Court should find that the ICC's Division 2 clearly erred in approving a rate structure which resulted in an unreasonable practice in violation of Section 1(6) and in undue preference and prejudice in violation of Section 3(1). The ICC's report and order should be reversed and remanded for further proceedings consistent with the Court's opinion.

Respectfully submitted,

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August 8, 1977

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ADDENDUM A - 3 ICC ORDERS

12 SERVICE UNIT 31

DECISION AND ORDER

AUG 4 1976

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2,
held at its office in Washington, D. C., on the 29th day
of July, 1976.

No. 35960

SUNKIST GROWERS, INC., ET AL.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.

Upon consideration of the complaint and record in the above-captioned proceeding, including: The initial decision of the Administrative Law Judge served March 4, 1975; the exceptions and request for oral argument filed on April 16, 1975, by defendants Akron, Canton, and Youngstown Railroad Company, et al; and the reply thereto filed May 8, 1975 by complainants, Sunkist Growers, Inc., et al; the petition filed January 30, 1976, by the Long Island Railroad Company (LIRR) requesting that an additional exception tendered therewith be accepted for filing; reply thereto filed February 19, 1976, by defendants, other than Long Island Rail Road and Canadian Railroads; and statement filed March 12, 1976, by complainants in response to the said tendered exception:

It is ordered, That the petition of the LIRR filed January 30, 1976, be and it is hereby granted and the tendered exception be, and it is hereby, accepted for filing.

It appearing, That the Administrative Law Judge found that the failure of defendants to establish and maintain alternative rates and minima for the transportation over their lines of fresh citrus fruit from points in California and Arizona to transcontinental Pacific Southcoast Freight Bureau Territory destinations as shown in Appendices A and B is shown to violate sections 1(5) and 1(6) of the Interstate Commerce Act but not to be otherwise unlawful; that this decision is not a major Federal action affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969;

It further appearing, That the Administrative Law Judge ordered that the unlawfulness be removed by ordering defendants to establish and maintain for the transportation of fresh citrus fruit in carloads from points in California and Arizona, the incentive rates and minima to transcontinental destinations as shown in Appendix A of the initial decision and to destinations in Pacific Southcoast Freight Bureau Territory as shown in Appendix B, both subject to general increases authorized to and including Ex Parte No. 305, and both subject to the conditions pertaining to diversion, reconsignment, and stopping for partial unloading as discussed in the initial decision and in Appendix C thereof;

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It further appearing, That subsequent to the filing of the exceptions in this proceeding, defendants filed a motion on October 28, 1975 asking that the Commission take official notice that on October 19, 1975 and later, the rates herein complained of were cancelled and in their place became effective the incentive rates and minima subject to the specified conditions of transportation as ordered by the Administrative Law Judge in the initial decision, and including general increases authorized to and including Ex Parte No. 305; that, as such, defendants allege the complaint herein is, therefore, moot;

It further appearing, That in their reply to defendants' motion, filed November 24, 1975, complainants acknowledge that incentive rates on citrus fruit in substantial compliance with the Administrative Law Judge's order in the initial decision have been published by defendants and are now effective to most destinations within the United States; however, with respect to destinations on LIRR, complainants contend the new rates are not effective due to the failure of the LIRR to concur in the publication of such rates;

It further appearing, That the Commission takes official notice that on October 19, 1975, in Supplement 117, TCFB Tariff 44-R, I.C.C. No. 1838, the rates subject of this proceeding were cancelled, and in their place became effective the incentive rates and minima, subject to the specified conditions of transportation and including general increases authorized to and including Ex Parte No. 305, from points in California and Arizona to all United States destinations in transcontinental destinations, as ordered by the Administrative Law Judge in the initial decision with one exception; that with respect to destinations on the LIRR, the new rates are not effective due to failure of the Long Island to concur in the publication of such rates; that on December 24, 1975 in Supplement 121 to Pacific Southcoast Freight Bureau Tariff 60-0, I.C.C. No. 1787, the same incentive rates and minima subject to the same conditions and general increases as noted above, became effective from points in California and Arizona to those points in North Coast territory as also ordered by the Administrative Law Judge in the initial decision;

It further appearing, That, despite the failure of LIRR to concur in the publication of the above-described incentive rates, nevertheless the order of the Administrative Law Judge may be substantially complied with by publication of incentive rates on fresh citrus fruit from points in California and Arizona to transcontinental destinations on the LIRR at a level including the Ex Parte No. 295 general rate increases;

And it further appearing, That the exceptions do not show any material errors in the Administrative Law Judge's statement and evaluation of the facts, conclusions of law, or findings; do not raise any material matters of fact or law not adequately considered and properly disposed of in his decision; and are not of such nature as to require the issuance of a report by Division 2 discussing the evidence and the arguments advanced in light of the exceptions;

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Wherefore, and good cause appearing therefor:

We find, That because of publication of the alternative rates and minima noted above, in substantial compliance with the order of the Administrative Law Judge in the initial decision, the complaint in this proceeding should be, and it is hereby, found moot as to the rates on fresh citrus fruit traffic moving on lines of defendants who participated in the new tariff, but not to rates on such traffic moving to destinations on the LIRR, which did not concur in the publication of such new rates.

We further find, That the evidence considered in the light of the exceptions and the reply thereto does not warrant a result different from that reached by the Administrative Law Judge, except with respect to destinations on the LIRR to which points we find that the failure of defendants to establish alternative rates on the basis of the Ex Parte No. 295 general increase level violates sections 1(5) and 1(6) of the Interstate Commerce Act; and except as indicated hereinafter, the statement of facts, conclusions, and findings of the Administrative Law Judge, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own.

It is further ordered, That in adopting the Administrative Law Judge's report as our own, the following changes be, and they are hereby, made in his report:

1. On sheet 2, third paragraph, lines 7 and 8, substitute "North Coast Territory destinations" in lieu of "Pacific Southcoast Freight Territory."
2. On sheet 11, last complete paragraph, line 16, substitute "previously" in lieu of "now."
3. On sheet 11, last complete paragraph, add the following sentence at the end of the paragraph:

The rates in that proceeding, however, were ordered cancelled by order of the Commission on December 30, 1974.

4. On sheet 18, first paragraph, line 29, substitute "8944" in lieu of "7944".
5. On sheet 22, second full paragraph, line 3, delete "Pacific Southcoast Freight Bureau Territory" and add "North Coast Territory as shown in the Pacific Southcoast Freight Bureau tariff referred to in Appendix B,".
6. Sheet 23, third paragraph, lines 6 and 7, delete "Pacific Southcoast Freight Bureau Territory destinations" and add "North Coast Territory destinations (except traffic destined to points on the LIRR)".
7. On sheet 23, fifth paragraph, lines 5 and 6, delete "Pacific Southcoast Freight Bureau Territory as shown in Appendix B" and add "North Coast territory as shown in the Pacific Southcoast Freight Bureau Tariff referred to in Appendix B".

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It is further ordered, That the request for oral argument be, and it is hereby, denied because sufficient grounds have not been presented to warrant granting the action sought.

It is further ordered, That the LIRR and all other defendant railroads which participate in the movement of the considered traffic from points in Arizona and California to transcontinental destinations on the LIRR as shown in Appendix A of the initial decision, be, and they are hereby, notified and required to cease and desist, on or before the effective date of this order, and thereafter to abstain from practices found in the initial decision to be unjust and unreasonable;

It is further ordered, That the LIRR and the defendants described in the preceding paragraph establish and maintain, for the transportation of fresh citrus fruit, in carloads from points in California and Arizona to destinations on the LIRR, incentive rates published on the basis of Ex Parte No. 295 general increase level and subject to the conditions pertaining to diversion, reconsignment, and stopping for partial unloading as described in the initial decision and in Appendix C of the initial decision;

It is further ordered, That this order shall become effective 30 days after the date of service hereof.

And it is further ordered, That this order shall continue in force and effect until further order of the Commission.

By the Commission, Division 2, Commissioners Hardin, O'Neal and Clapp.
(Commissioner Clapp did not participate.)

ROBERT L. OSWALD
Secretary

(SEAL.)

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Addendum A.

SERVICE DATE

ORDER

MAR 10 1977

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 2nd day of March, 1977.

RECEIVED

No. 35960

MAR 14 1977

SUNKIST GROWERS, INC., ET AL.

**THE LONG ISLAND
RAIL ROAD COMPANY**

v.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.

Upon consideration of the record in the above-entitled proceeding, including the decision and order of the Commission, Division 2, served August 4, 1976; the petition for reconsideration filed September 3, 1976, by defendants Akron, Canton & Youngstown Railroad Company, et al., other than Long Island Rail Road Company and Canadian Railroads; and the reply to the petition, filed September 20, 1976, by Long Island Rail Road Company;

It appearing, That section 17(9)(c) of the Interstate Commerce Act (Act) as amended by the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act) enacted February 5, 1976, provides that there may be only one review of an initial decision as a matter of right in railroad rate cases;

It further appearing, That the parties, having filed pleadings in the exception of further Commission action, might now be precluded from seeking timely judicial review if the Division 2 decision were found by the Commission to have become administratively final;

It further appearing, That a finding of administrative finality of the decision to which the subject appeal is addressed is not required in this instance as section 17(9)(d) of the Act as amended by the 4R Act provides that "If the Commission finds that a decision, order, or requirement presents a matter of general transportation importance... the Commission may reconsider such decision, order, or requirement, and it may, in its discretion stay the effective date of such decision, order, or requirement;

It further appearing, That this proceeding was instituted and an initial decision rendered prior to the enactment of the 4R Act, but that the Division 2 decision and order was issued and the pending petition for reconsideration filed subsequent to the 4R Act;

It further appearing, That the parties, having filed pleadings in the expectation of further Commission action, might now be precluded from seeking timely judicial review if the Division 2 decision and order were found by the Commission to have become administratively final;

It further appearing, That a finding of administrative finality is not required in this instance, since Section 17(9)(d) of the Act, as amended by the 4R Act, authorizes Commission reconsideration whenever "a decision, order, or requirement presents a matter of general transportation importance";

Addendum A.

No. 35960

It further appearing, That in view of the unusual circumstances presented in this transitional proceeding, to protect the rights of the parties, and to avoid undue disruption of the administrative process, a finding of general transportation importance is warranted;

And it further appearing, That, at the prescription level, the rates to Long Island destinations and rates established by the carriers to other Group A points are the same, and that our action herein is not intended to preclude minor adjustments of the type discussed by replicant to restore parity following application of subsequent general increases;

It is ordered, That this proceeding be, and it is hereby, designated as one involving an issue of general transportation importance;

And it further appearing, That, upon reconsideration, sufficient grounds have not been presented to warrant granting the action sought;

It is further ordered, That the petitions be, and they are hereby, denied and the complaints filed in these proceedings be, and they are hereby, dismissed.

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

NOTICE: By this order this proceeding is rendered administratively final pursuant to Section 17 of the Interstate Commerce Act, as amended, and within the meaning of Section 704 of the Administrative Procedure Act.

By the Commission.

ROBERT L. OSWALD
Secretary

(SEAL)

Addendum A.

COMMISSIONER MURPHY, dissenting:

The majority by its decision creates an anomaly which is not only at odds with the factual situation herein but is also in contradiction to well established precedents. The prescribed basis will only apply on movements to points on the Long Island and at the Ex Parte No. 295 level. The principal movements of citrus fruit to the majority of points in the East will be subject to a higher although voluntarily established basis of charges at the Ex Parte No. 305 level. Uniformity of application of such predominant charges is again being sacrificed because of the obstinate demands of one small carrier. The well-intentioned program for tariff updating will consequently suffer.

My position as to the unilateral imposition of a surcharge is stated in my separate expressions in Increases in Freight Rates and Charges - 1973, 350 I.C.C. 673, 719-724, (1975) and the order in Ex Parte No. 299 (Sub-No. 1), entered November 23, 1976, served December 9, 1976 and needs no further elaboration herein.

The prescription herein will no doubt raise many unanticipated problems both as to the application of general increases in the future and reparation or damages arising out of the aberration prescribed herein.

In these circumstances, I cannot join in the otherwise well-intentioned but erroneous decision of the majority. To the extent that the decision differs from the position stated above, I respectfully dissent therefrom.

Addendum A.

(SEAL)

COMMISSIONER MURPHY, dissenting:

For the reasons stated in my separate expression of March 2, 1977, in this matter, among others, I would deny the petition for interpretation as not only inappropriate, untimely, but also unduly prejudicial. In effect, petitioner seeks to impose an exorbitant charge on all shippers whether or not they ship to points on the Long Island in order to solve problems which are unique to its circumstances. The law does not allow such a unilateral, discriminatory levy.

Addendum A.

QC 340C

ORDER

SERVICE DATE

JUN 6 1977

At a General Session of the INTERSTATE COMMERCE COMMISSION, held
its office in Washington, D.C., on the 31st day of May, 1977.

No. 35960

SUNKIST GROWERS, INC., ET AL.

v.

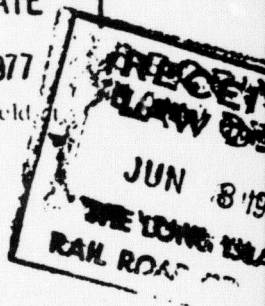
THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.

Upon consideration of the record in the above-entitled proceeding, including the order of the Commission, served March 10, 1977; the petition for interpretation filed March 17, 1977, by the Long Island Railroad (LIRR); and the replies to the petition, filed March 25, 1977, by Sunkist Growers, Inc. (Sunkist) and April 1, 1977, by defendants Akron, Canton & Youngstown Railroad Company, et al., other than Long Island Rail Road Company and Canadian Railroads;

It appearing, That the LIRR and Sunkist contend that the Commission's order served March 10, 1977, requires clarification insofar as said order both denies defendant railroads' petition for reconsideration and dismisses the complaint in this proceeding; that by denying the petition for reconsideration, the Commission intended to affirm the decision and order of the Commission, Division 2, served August 4, 1976, which ordered the LIRR and all other defendant railroads participating in the movement of citrus fruit traffic to LIRR destinations to establish rates at a prescribed level; and that dismissal of the complaint in this proceeding without ordering defendant railroads to institute within a specified period of time the appropriate lawful rates frustrates the manifest intent of the Commission;

It further appearing, That defendant railroads, in opposition to said petition, maintain that failure of the order of the Commission to direct defendant railroads to establish and maintain joint rates to LIRR destinations at a prescribed level was not an inadvertent omission but mandated by Section 202 of the 4-R Act; that said section requires a finding by the Commission, heretofore not made, of market dominance in order to prescribe a maximum reasonable level of rates in this proceeding; and that the order of the Commission only admonishes the railroads for not publishing joint rates to LIRR destinations in accordance with the order of the Commission, Division 2;

It further appearing, That, in light of the decision in Burlington, Northern, Inc., et al. v. United States, et al., No. 76-1899, U.S.C.A., 8th Circuit, decided March 29, 1977, Section 202 of the 4-R Act, 49 U.S.C. §1(5), is not applicable to the present proceeding;



Addendum A.

It further appearing, That the decision and order of the Commission, Division 2, served August 4, 1976, found the complaint in this proceeding moot as to rates on fresh citrus fruit traffic moving on lines of defendants who participated in the publication of incentive rates and minima in accordance with the Administrative Law Judge's initial decision, served March 4, 1975, but not to rates on such traffic moving to destinations on the LIRR, which did not concur in the publication of such new rates; and that said decision and order directed the LIRR and all other defendant railroads which participate in the movement of the considered traffic from points in Arizona and California to transcontinental destinations on the LIRR to establish and maintain incentive rates published on the basis of Ex Parte No. 295 general increase level and subject to the conditions pertaining to diversion, reconsignment, and stopping for partial unloading in the initial decision and in Appendix C of the initial decision;

It further appearing, That the Commission's order served March 10, 1977, denied the petition for reconsideration and intended to affirm the decision and order of the Commission, Division 2; and that the complaint in this proceeding was inadvertently dismissed;

And it further appearing, That the prescribed level of rates on the considered traffic to transcontinental destinations on the LIRR ordered by the decision and order of the Commission, Division 2, has not been established;

Wherefore, and good cause appearing therefor:

It is ordered, That the petition for interpretation be, and it is hereby, granted.

It is further ordered, That the following changes be, and they are hereby, made in the order of the Commission served March 10, 1977:

1. Delete from the second ordering paragraph "and the complaints filed in these proceedings be, and they are hereby dismissed".
2. Delete the last ordering paragraph.

It is further ordered, That the LIRR and all other defendant railroads be, and they are hereby, required on or before 20 days from the date of service of this order, upon not less than 1 day's notice to this Commission and to the general public, to establish and maintain the prescribed level of rates to transcontinental destinations on the LIRR in accordance with the decision and order of the Commission, Division 2, served August 4, 1976.

And it is further ordered, That this order shall continue in force and effect until further order of the Commission.

By the Commission. (Commissioners Gresham and Christian did not participate.)

ROBERT L. OSWALD
Secretary

(61777)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

376—Affidavit of Service by Mail

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

THE LONG ISLAND RAILROAD CO.,

Petitioner,

V.

THE UNITED STATES OF AMERICA, & THE INTERSTATE COMMERCE COMMISSION,

Respondents,

ET AL,

State of New York, County of New York, ss.:

Kenneth P. Riccardi
for George M. Oken, Esq. &
Richard H. Stokes, Esq.

for the above named **BRIEF**

, being duly sworn deposes and says that he is **agent**
the attorney

herein. That he is over

21 years of age, is not a party to the action and resides at **2821 W. 12th St Bklyn, NY 11224**

That on the **8** day of **August**, 19 **77**, he served the within

BRIEF

upon the attorneys for the parties and at the addresses as specified below

Walter J. Myskowski
Attorneys for Petitioner
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706 Ring Building
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John MacDonald Smith
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San Francisco, California 94105

by depositing **3 true briefs**
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-
tained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned,
that being the addresses within the state designated by them for that purpose, or the places
where they then kept offices between which places there then was and now is a regular com-
munication by mail.

Sworn to before me, this
day of August, 19 77

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} Denneth F. Riccardi

Robert W. Johnson

ROBERT W. JOHNSON
Notary Public, State of New York

Qualified in Delaware County
Commission Expires March 30, 1977